Supreme Court, U.S.
FILED

NOV 17 2003

No. 03-717

In The

Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE, and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

PEGGY A. LAUTENSCHLAGER
Attorney General

EDWIN J. HUGHES*
Assistant Attorney General
State Bar #1005126
Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
Counsel of Record

6 11

QUESTION PRESENTED

1. Whether Wis. Stat. § 196.795(5)(L), which requires a holding company that owns or controls a Wisconsin utility to be incorporated under Wisconsin law, is unconstitutional under the Commerce Clause.

No. 03-569

In The

Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE, and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,

Respondents and Cross-Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Seventh Circuit is reported at 330 F.3d 904 and is set forth in the Petitioner's Appendix (Pet.) at 10a-37a.

JURISIDICTION

The Seventh Circuit's decision was entered on May 29, 2003. The plaintiffs-appellants' timely petition for rehearing *en banc* was denied by the Seventh Circuit on July 14, 2003. The petition for a writ of certiorari of Alliant Energy Corporation (Alliant) was docketed on October 17, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, U.S. Const. Art. 1 § 8 cl. 3, grants to Congress the power "[t]o regulate commerce . . . among the several States."

Wis. Stat. § 196.795(5)(L) provides: "Any holding company which is incorporated shall be incorporated under Wis. Stat. ch. 180."

STATEMENT

Respondents-Cross-Petitioners are the Commissioners of the Wisconsin Public Service Commission and will be referred to herein as the Commissioners. The Commissioners incorporate by reference their Statement set forth in Respondents' Brief in Opposition. In summary, Alliant and its subsidiary, Wisconsin Power and Light Company, brought a constitutional challenge to five provisions of Wisconsin law, including four provisions of the Wisconsin Utility Holding Company Act (WUHCA), Wis. Stat. § 196.795. The district court granted summary judgment for the defendants and dismissed the action. The Seventh Circuit concluded that one of the challenged provisions of WUHCA – § 196.795(5)(L) – was unconstitutional, but affirmed the district court decision in all other respects. The provision struck down requires holding

companies that own or control Wisconsin utilities to be incorporated under Wisconsin law. The court concluded that this provision ran afoul of the Commerce Clause.

Alliant has filed a certiorari petition seeking review of that part of the Seventh Circuit decision upholding the constitutionality of the remaining WUHCA provisions. If the Court grants Alliant's petition, then the Commissioners request that the Court grant their cross-petition and consider as well Part II.b.ii of the Seventh Circuit's decision, which considers Alliant's Commerce Clause challenge to Wis. Stat. § 196.795(5)(L).

REASONS FOR GRANTING THE CROSS-PETITION

In their Brief in Opposition, the Commissioners have pointed out the absence of any reason for this Court to accept Alliant's petition, as well as deficiencies in the arguments that Alliant has presented in support of its petition. That discussion is incorporated herein by reference. One of the factors Alliant has identified in support of its assertion that the structural provisions of WUHCA violate the Commerce Clause is that, in light of the Seventh Circuit's ruling striking down Wis. Stat. § 196.795(5)(L), the impact of the provisions may be felt by utility holding companies that are not incorporated under Wisconsin law. As explained in the Brief in Opposition, Alliant's argument on this point proceeds from a misunderstanding of how even-handed utility regulation is to be analyzed under the Commerce Clause.

The Commissioners recognize the possibility that this Court may find Alliant's petition more compelling than they do. If the Court were to accept the petition, then it may consider the significance under the Commerce Clause of whether the restrictions imposed by the challenged provisions affect just Wisconsin corporations, or affect as well utility holding companies that own or control Wisconsin

utilities but that are incorporated under other states' laws. If the Court were to conclude that this is a significant distinction, then it would become relevant that, prior to the Seventh Circuit's decision, Wisconsin law did require utility holding companies to be Wisconsin corporations and so restricted the impact of the challenged provisions to in-state corporations. The role that Wis. Stat. § 196.795(5)(L) played in the statutory scheme would become appropriate for consideration, and so the Seventh Circuit's striking down of the provision would become a ruling that should properly be considered by the Court.

Accordingly, if the Court were to grant Alliant's certiorari petition, then it should also grant the Commissioner's cross-petition so that the entire WUHCA statutory scheme as contemplated by the Wisconsin legislature is before the Court.

CONCLUSION

If the Court grants Alliant's petition for a writ of certiorari, it should also grant the Commissioners' cross-petition.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General

EDWIN J. HUGHES*
Assistant Attorney General

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487